

Message Text

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ACTION EB-08

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C O N F I D E N T I A L SECTION 1 OF 2 LAGOS 8182

E.O. 11652: GDS

TAGS: EAIR, NI

SUBJECT: PAN AM FOURTH FREQUENCY REJECTED

REF: A) LAGOS 8156; B) LAGOS 8119

1. SUMMARY: PER REFTELS, EMBASSY TEAM MET ON JULY 3 WITH HIGH LEVEL CIVAIR OFFICIALS IN ATTEMPT TO OBTAIN FMG ACKNOWLEDGEMENT OF FOURTH FREQUENCY FOR PAN AM. IT WAS SOON APPARENT THAT NIGERIAN INTERPRETATION OF AGREEMENT IS COMPLETELY AT ODDS WITH THAT OF U.S. EMBASSY RECOMMENDS RENEGOTIATION OF AGREEMENT AS LEAST UNDESIRABLE OPTION. END SUMMARY.

2. EMBASSY TEAM COMPOSED OF DCM, ECON COUNSELOR AND TRANSPORTATION OFFICER OPENED MEETING BY POINTING OUT THAT TERMS OF AGREEMENT AUTHORIZED AIRLINES TO INITIATE FREQUENCIES ON A UNILATERAL BASIS WITHOUT ADDITIONAL APPROVAL OF SIGNATORY GOVERNMENT. IN PARTICULAR, EMBASSY CITED ARTICLE 3, PARAGRAPH 3. EMBASSY WENT ON TO POINT OUT THAT NOWHERE IN THE AGREEMENT COULD ONE FIND LANGUAGE WHICH SUPPORTED THE NECESSITY OF PRIOR APPROVAL.

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3. NIGERIAN REPRESENTATIVES, LED BY PRINCIPAL SECRETARY ADEGBENRO AND MINISTRY'S LEGAL ADVISOR OSIKOYA, RESPONDED THAT CRITERIA FOR CONSIDERING ACCEPTABILITY OF ADDITIONAL FLIGHTS WERE FOUND IN THE VARIOUS PARAGRAPHS OF ARTICLE 9. ADEGBENRO WENT ON TO CITE ARTICLE 11 AS REQUIRING PAN AM TO SUPPLY STATISTICS SUPPORTING A FOURTH FREQUENCY AND POINTED

OUT THE MEMORANDUM OF UNDERSTANDING WHEREIN NIGERIAN DELEGATION HAD NOTED PAN AM'S DEVELOPMENT PLANS WITHOUT COMMITMENT. EMBASSY REBUTTED NIGERIAN POSITION BY POINTING OUT THAT EQUAL OPPORTUNITY DISCUSSED IN ARTICLE 9 REFERRED TO EQUALITY OF ACCESS AND THAT IN ANY CASE NIGERIA'S TWO FREQUENCIES AMOUNTED TO CAPACITY OF 548 SEATS WHILE PAN AM'S THREE FREQUENCIES ONLY AMOUNTED TO 420 SEATS. STATISTICS ARGUMENT WAS ANSWERED BY SAYING THAT ARTICLE 11 ONLY REFERRED TO GOVERNMENT TO GOVERNMENT EXCHANGE OF STATISTICS AND DID NOT REPEAT DID NOT REFER TO A DEFENSE BY PAN AM OF AN ADDITIONAL FREQUENCY.

4. AT THIS POINT, THE NIGERIAN OFFICIALS BROUGHT OUT THE CENTRAL ISSUE BEHIND THEIR INTERPRETATION OF THE AGREEMENT. NIGERIA AIRWAYS HAS BEEN FLYING FOR TWO MONTHS WITH AIRPLANES THAT ARE NEARLY EMPTY, AND ADDITIONAL PAN AM FLIGHTS WOULD MAKE SITUATION WORSE. ADEGBENRO EMPHASIZED THAT, IF THE AGREEMENT DID NOT PROVIDE FOR PRIOR APPROVAL, THEN PAN AM COULD CONCEIVABLY HAVE MORE AND MORE FREQUENCIES AND PUT WT OUT OF BUSINESS. EMBASSY, WHILE EXPRESSING SYMPATHY FOR WT'S ECONOMIC WOES, REITERATED THAT PRIOR APPROVAL HAD BEEN THOROUGHLY DISCUSSED AND REJECTED DURING NEGOTIATIONS. CENTRAL QUESTION WAS NOT PROFITABILITY OF NIGERIA AIRWAYS BUT FACT THAT UNDER THIS CONFIDENTIAL

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AGREEMENT AIRLINES COULD ALTER THEIR FREQUENCIES WITHOUT HAVING TO REQUEST PERMISSION FROM GOVERNMENT. CIVAIR STATED THAT THE ONLY REASON FREQUENCIES, CAPACITIES AND SCHEDULES WERE NOT SPELLED OUT IN THE AGREEMENT WAS THAT NIGERIA WANTED A FLEXIBLE ARRANGEMENT. ADEGBENRO CLAIMED THAT NEGOTIATION TEAM ALWAYS UNDERSTOOD THAT PAN AM WOULD CONSULT WITH NIGERIA AIRWAYS BEFORE INSTITUTING A NEW FREQUENCY. CIVAIR ALSO REFERRED TO RECENTLY CONCLUDED BERMUDA II AGREEMENT AND SAID THAT IN THAT AGREEMENT EVERYTHING WAS SPELLED OUT BETWEEN THE U.S. AND U.K.

5. AFTER FURTHER DISCUSSION, WITH BOTH SIDES MAINTAINING THAT AGREEMENT SUPPORTED ENTIRELY DIFFERENT CONCEPTS, CIVAIR STATED THAT PAN AM SHOULD NOT TRY TO MAKE AN INTERNATIONAL INCIDENT OUT OF ITS FOURTH FREQUENCY. STRESSING THAT, QUOTE WE CANNOT BE STAMPEDED UNQUOTE, CIVAIR OFFICIALS CONCLUDED THAT THE TWO COUNTRIES MIGHT HAVE TO GO TO ARBITRATION UNDER ARTICLE 14 TO RESOLVE APPARENT DEADLOCK. THEY SAID THAT THEY WOULD NOT, UNDER ANY CIRCUMSTANCES, AUTHORIZE LANDING

PERMISSION AT PRESENT FOR THIS FOURTH PAN AM FREQUENCY.

6. COMMENT: EMBASSY SEES AT LEAST FOUR ACTION
OPTIONS OPEN TO USG IN THIS SITUATION:
A. WE COULD MAINTAIN THE AGREEMENT AND HAVE PAN
AM OFFICIALS GO TO NIGERIA AIRWAYS OFFICIALS IN
EFFORT TO PERSUADE THEM THAT THE FOURTH FREQUENCY
WILL BENEFIT, NOT HARM, NIGERIA AIRWAYS SALES. THIS
OPTION IS UNSATISFACTORY SINCE THE COMPETITIVE PRINCIPLES
FAVORED BY USG AVIATION POLICY WOULD BE
COMPROMISED BY OUR IMPLICIT ACKNOWLEDGEMENT OF PRIOR
APPROVAL.
B. WE COULD STAND BY THE AGREEMENT AND GO TO ARBITRA-
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TION UNDER ARTICLE 14. THIS WOULD SEEM TO BE

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C O N F I D E N T I A L SECTION 2 OF 2 LAGOS 8182

ACCEPTABLE TO THE NIGERIANS BUT WE DOUBT THIS IS
REALLY DESIRED BY THEM. MOREOVER, WE BELIEVE
DEPARTMENT HAS EXPERIENCED UNSATISFACTORY RESULTS
FROM ARBITRATION IN THE PAST. THE NATION WHICH
LOSES UNDER ARBITRATION DOES NOT ALWAYS CONCEDE
THE OUTCOME.

C. WE COULD STAND BY THE AGREEMENT AND RECIPROCATATE BY REVOKING LANDING RIGHTS FOR A NIGERIA AIRWAYS FREQUENCY. GIVEN THE ATTITUDE DISPLAYED BY CIVAIR MIN. OFFICIALS IN MEETING, THIS WOULD PROBABLY CAUSE FURTHER RETALIATION AND COULD RESULT IN HAVING THIS MARKET COMPLETELY DENIED TO PAN AM. MOREOVER, OUR ACTION WOULD BE BITTERLY RESENTED BY FMG OFFICIALS AND WOULD APPRECIABLY AFFECT OVERALL U.S.-NIGERIAN RELATIONS.

D. THE FOURTH OPTION SEEMS THE LEAST UNDESIRABLE. WE COULD CALL FOR A RENEGOTIATION OF THE AIR AGREEMENT BETWEEN NIGERIA AND THE UNITED STATES. AGREEMENT HAS OBVIOUSLY GIVEN RISE TO STRONGLY HELD DIFFERENCES OF INTERPRETATION. IT DOES NOT PROVIDE A SATISFACTORY BASIS FOR A LONG-TERM CONFIDENTIAL

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RELATIONSHIP.

7. EMBASSY WISHES TO EMPHASIZE ITS OPINION THAT THE NIGERIANS HONESTLY BELIEVE THEIR CASE IS ECONOMICALLY LOGICAL AND LEGALLY SOUND. THE AGREEMENT NOWHERE STATES THAT FREQUENCIES CAN BE ADDED WITHOUT THE APPROVAL OF A CONTRACTING PARTY AND THE MEMORANDUM OF UNDERSTANDING SPECIFICALLY STATES THAT THE NIGERIAN SIDE MADE NO COMMITMENT REGARDING THE NUMBER OF FREQUENCIES WHICH PAN AM WOULD BE OPERATING - A STATEMENT WHICH IMPLIES THAT THE NIGERIANS FELT THEY HAD A RIGHT TO ACCEPT OR REJECT. MOREOVER, THE NIGERIANS CONTEND THAT THE PROVISIONS OF ARTICLE 9, PARTICULARLY PARAGRAPH 2, CLEARLY IMPLY THAT THE NUMBER OF FLIGHTS OPERATED BY THE AIRLINE OF ONE CONTRACTING PARTY SHOULD BE INFLUENCED BY THE EFFECT WHICH THOSE FREQUENCIES WOULD HAVE ON THE AIRLINE OF THE OTHER CONTRACTING PARTY. GIVEN THESE CONSIDERATIONS, AND THE EXISTENCE OF ARTICLE 14, WE HAVE LITTLE DOUBT THAT TOP FMG OFFICIALS WOULD CONSIDER IT OUTRAGEOUS IF THE USG RETALIATED AGAINST NIGERIA AIRWAYS FREQUENCIES TO THE U.S. INSTEAD OF RESORTING TO ARBITRATION, REQUESTING APPROVAL OF THE FOURTH FREQUENCY, OR SEEKING RENEGOTIATION OF THE AGREEMENT. THE ARGUMENT THAT THE U.S. INTERPRETATION OF THE CONTROVERSIAL POINT WAS REPEATEDLY MADE CLEAR ORALLY BY THE U.S. NEGOTIATORS AND WAS ORALLY ACCEPTED BY THE NIGERIAN NEGOTIATORS IS NOT GOING TO CARRY ANY WEIGHT AT ALL WITH THEM IN THE ABSENCE OF WRITTEN EVIDENCE.

8. EVEN RENEGOTIATION OF THE AGREEMENT WILL POSE

CONSIDERABLE PROBLEMS, HOWEVER. WE SEE LITTLE LIKELI-
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HOOD THAT THE FMG WILL SIGN AN AGREEMENT WHICH
CLEARLY PROVIDES FOR THE UNILATERAL FREEDOM
TO CHANGE FREQUENCIES WHICH THE USG DESIRES. THEY
WILL WANT A RIGHT TO APPROVE SUCH CHANGES AND, IN
IMPLEMENTING THAT RIGHT, THEY MAY WELL INSIST THAT
THE FREQUENCIES OPERATED BY PAN AM NOT BE INCREASED
UNTIL SUCH TIME AS NIGERIA AIRWAYS HAS A COMMERCIALY
PROFITABLE OPERATION ON THIS RUN WITH ITS PRESENT
FREQUENCY OF FLIGHTS.
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